

The European Court of Justice Denies Professional Legal Privilege to Employed Lawyers

Maurits Dolmans, Dirk Vandermeersch, and Jay Modrall

The authors of this article discuss a much-awaited ruling by the European Court of Justice confirming that written communications between a company-client and its employed in-house lawyer do not benefit from legal professional privilege and are thus not protected against disclosure in the context of EU competition law investigations.

On September 14, 2010, the European Court of Justice (Court) issued judgment in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v. European Commission*, relating to legal professional privilege (LPP) under European Union (EU) law.¹ In the much-awaited ruling, the Court confirms that written communications between a company-client and its employed in-house lawyer do not benefit from LPP and are thus not protected against disclosure in the context of EU competition law investigations. Crucially, the Court found that this holds true even where the employed lawyer is a member of a national Bar and where both applicable Bar rules and the in-house lawyer's employment agreement aim to guarantee independence from the employer.

The judgment maintains the Court's long-standing holding in the 1982 *AM&S* case,² which reserved LPP to outside legal counsel who are members of a Bar. The judgment comes as a disappointment to much of industry, including the European Company Lawyers' Association (ECLA), which have long advocated extending LPP to in-house counsel in EU competition law investigations.

BACKGROUND

In its 1982 *AM&S* ruling, the Court held that lawyer-client communications benefit from LPP if they are (1) made for the purpose and in the interests of a client's rights of defense, and (2) exchanged between a client and an "independent lawyer that is to say one who is not bound to his client by a relationship of employment" and who is member of a Bar.³

Maurits Dolmans, Dirk Vandermeersch, and Jay Modrall are partners at Cleary Gottlieb Steen & Hamilton LLP. The authors may be contacted at mdolmons@cgsh.com, dvandermeersch@cgsh.com, and jmodrall@cgsh.com, respectively. Cleary Gottlieb Steen & Hamilton LLP represented, pro bono, the European Company Lawyers' Association in the matter discussed in this article.

Akzo sought to expand the scope of LPP following a 2003 on-site inspection by the European Commission during which internal written communications from a Dutch Akzo in-house counsel were seized. The in-house counsel was a member of the Dutch Bar and subject to rules aimed at guaranteeing the full independence of employed lawyers. Akzo took the view that

LPP should therefore apply and that the relevant internal communications should be returned to it. The Commission refused to return the documents, and Akzo appealed the Commission's decision to the General Court.

Although the President of the General Court, Judge Vesterdorf, had granted interim relief in an Order providing detailed and convincing reasons as to why LPP should be recognized for in-house counsel on October 30, 2003,⁴ in a 2007 ruling, the General Court sided with the Commission.⁵ The General Court reiterated the *AM&S* criterion of "full independence," adding that LPP applies only where legal advice is provided by a lawyer "who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice."⁶ Any changes in national laws regarding LPP since *AM&S* were not, according to the General Court, sufficient to change the Court's *AM&S* rule, and only the Court could overturn that rule. Akzo then appealed to the Court. The key issue before the Court on appeal was whether written communications between a Dutch employed lawyer (*Advocaat*) who is a member of the Bar (*Nederlandse Orde van Advocaten*) and the lawyer's employer-client are protected by the EU rule on the confidentiality of lawyer-client communications.

THE COURT'S JUDGMENT

On the Requirement of Independence

The Court's judgment centers on the issue of independence, more specifically whether employed lawyers can satisfy the requirement of independence as laid down in the *AM&S* judgment. In essence, the Court held that employed lawyers do not enjoy the same degree of independence as external lawyers working in law firms, and thus communications with the former cannot, and do not, benefit from LPP. According to the Court "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers."⁷

Referring to the Advocate-General's Opinion,⁸ the Court added that:

the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.⁹

According to the Court, the fact that an employed lawyer may be subject to ethical and disciplinary rules is not sufficient to ensure the independence of employed lawyers. In spite of contrary statements in the Intervention from The Netherlands and legal opinions submitted by ECLA by the former chair of the Dutch Inter-ministerial Working Group that was responsible for granting privilege to in-house bar members, Dr. Job Cohen, and Dutch labour law expert Prof.

Dr. Wijnand Zondag, the Court observed that “the professional ethical obligations [under Dutch law] ... are not able to ensure a degree of independence comparable to that of an external counsel.” This was even more so given that the position of an employee lawyer “(...) by its very nature, does not allow [the lawyer] to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.”¹⁰ The Court also added that the fact an employed lawyer “may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the policy of the undertaking” only reinforces the close ties between an employed lawyer and the lawyer’s employer and by implication undermines the lawyer’s independence.¹¹

In conclusion, the Court considered that it followed “both from the in-house lawyer’s economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.”¹²

Changed Circumstances Since AM&S Not Sufficient to Alter Case Law

Adopting the General Court’s findings, the Court further considered that the evolution of the Member States’ legal systems does not support a departure from the *AM&S* rule. The Court noted that “the legal situation in the Member States of the European Union has not evolved, since the judgment in *AM&S Europe v. Commission* was delivered, to an extent which would justify a change in the case law and recognition for in-house lawyers of the benefit of legal professional privilege.”¹³

Similarly, developments in EU law, most notably the modernization of EU competition law enforcement pursuant to Council Regulation 1/2003 (Regulation 1/2003), do not warrant a reinterpretation of the *AM&S* rule. The Court noted that LPP is not “at all the subject-matter of the regulation” and thus it does not “aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege.”¹⁴ Thus, the Court focused on the wording of Regulation 1/2003, while failing to comment on the voluntary compliance regime that it established (and the associated need for in-house counsel LPP).

On Breaches of Principles of Equal Treatment, Rights of Defense, and Legal Certainty

The Court also rejected arguments based on breaches of equal treatment, the rights of defense, and the principle of legal certainty.

As regards the principle of equal treatment, the Court considered the EU Charter of Fundamental Rights and its prior case law. Because employed lawyers are economically dependent on, and personally identify with, their employers, the Court concluded that “in-house lawyers are in a fundamentally different position from external lawyers, so that their respective circumstances are not comparable.”¹⁵ Accordingly, the Commission’s failure to recognize LPP for communications with employed lawyers does not breach the principle of equal treatment.

With respect to the alleged breach of rights of defense, and more specifically the freedom to choose one’s lawyer, the Court observed that “any individual who seeks advice from a lawyer

must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.”¹⁶

Finally, regarding the principle of legal certainty, the Court underlined the division of powers in competition law enforcement (and the difference in enforcement procedures) between, on the one hand, the Commission and, on the other hand, the national competition authorities. According to the Court, LPP may “vary according to that division of powers and the rules relevant to it.” The principle of legal certainty does not require that the same LPP standard be applied in both EU and national enforcement of EU competition rules. EU rules apply to the Commission, while national rules apply in proceedings conducted by the national authorities. The Court thus concluded that “the fact that, in the course of an investigation by the Commission, legal professional privilege is limited to exchanges with external lawyers in no way undermines the principle [of legal certainty].”¹⁷

Breaches of the Principles of National Procedural Autonomy and Conferral

The Court also rejected arguments based on the principles of national procedural autonomy and conferral. The Court underlined that the uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.¹⁸

As regards the principle of conferral, the Court held that it could not be invoked in the present case, as the matter fell within the exclusive competence of the EU, *i.e.*, ensuring the proper functioning of the internal market (which includes the power to adopt rules of procedure with respect to EU competition law). Thus, “the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.”¹⁹

LPP Is Breached as Soon as Confidential Communications Are Seized

Finally, the Court followed the General Court’s findings and held that LPP is breached as soon as the Commission seizes documents to which confidentiality attaches, and not only if the Commission relies on privileged documents in a decision. The Commission had argued that Akzo had no interest in bringing the proceedings because the Commission had not relied on the contested documents in its final decision. The Court rejected the Commission’s argument and held that a “breach of legal professional privilege in the course of investigations does not take place when the Commission relies on a privileged document in a decision on the merits, but when such a document is seized by one of its officials.”²⁰

CONCLUSIONS

Despite years of advocacy to extend LPP to in-house counsel, the Court has confirmed the narrow scope of LPP in EU competition law investigations. The Court's ruling excludes LPP for any employed lawyers, whether or not they are subject to ethical and disciplinary rules. This will have important ongoing implications for companies with in-house legal departments. They will continue to need to consider carefully what precautions to take in light of the absence of LPP for in-house counsel.

Fortunately, the *Akzo* ruling, like *AM&S*, is limited to enforcement proceedings by the European Commission. It does not affect national rules on legal privilege, which will continue to apply in enforcement of national competition law and, according to the principle of procedural autonomy, in national enforcement of EU competition law. Unfortunately, however, there is some risk that the *Akzo* ruling may encourage national competition authorities to align their procedures to the more restrictive EU standard on LPP as articulated by the Court. For example, following the General Court's 2007 ruling in *Akzo*, the Belgian Competition Authority's investigators ceased to recognize LPP for members of the Belgian *Institut des juristes d'entreprise*, a national association for employed in-house lawyers that is set up by law.

LPP for in-house counsel remains critically important to ensure that companies can freely seek and rely on legal advice from their in-house legal departments. In-house counsel have long benefited from LPP in the United States, where in-house lawyers are seen as critical contributors to companies' compliance efforts. In view of the Court's ruling, and subject to possible further challenges before the European Court of Human Rights, efforts to extend LPP to in-house counsel in EU competition law investigations may have to shift to the legislative realm. Since the Commission (at least at present) would not propose such a change itself, the only prospect for such a step would be the introduction of a provision recognizing LPP for employed lawyers by the Council of Ministers or the European Parliament in an amendment to another measure proposed by the Commission. Unfortunately, such a change is unlikely to take place any time soon, but we encourage employed lawyers and companies to seek opportunities to introduce LPP for employed lawyers in appropriate EU legislation and to ensure that lobbyists on their behalf focus on this issue.

NOTES

¹ Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission*, judgment of Sept. 14, 2010 (not yet published).

² Case 155/79 *AM&S Europe Limited v. Commission of the European Communities* [1982] ECR 1575.

³ *AM&S*, at paras. 23-27.

⁴ Joined Cases "T"-125/03R and T-253/03R *Akzo Nobel Chemicals and Akros Chemicals v. Commission* [2003] ECR 11-4771, paras. 120-130. The President emphasized the role of Bar rules in a number of Member States in ensuring in-house counsel were subject to strict rules of professional conduct. *See also* B. Vestcrdorf, "Legal Professional Privilege and the Privilege against Self-incrimination in EC Law: Recent Developments and Current Issues," in: Hawk (Ed.), *International Antitrust Law and Policy 2004, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2005), pp. 701 et seq.

⁵ Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission of the European Communities*, 120)71 ECR 11-3523, at para. 123.

⁶ Cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission of the European Communities, [2007] ECR 11-3523, at para. 168.

⁷ Case C-550/07 P Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd v. European Commission, judgment of Sept. 14, 2010 (not yet reported), at para. 44.

⁸ Opinion of Advocate-General Kokott in Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission, at paras. 61-62.

⁹ *Ibid.* at para. 45.

¹⁰ *Ibid.* at para. 47.

¹¹ *Ibid.* at para. 48.

¹² *Ibid.* at para. 49.

¹³ *Ibid.* at para. 76.

¹⁴ *Ibid.* at paras. 83-87.

¹⁵ *Ibid.* at para. 58.

¹⁶ *Ibid.* at para. 96.

¹⁷ *Ibid.* at paras. 100-106.

¹⁸ *Ibid.* at para. 115.

¹⁹ *Ibid.* at para. 119.

²⁰ *Ibid.* at para. 25.